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Case No. 09-230

Supreme Court, U.S.
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In the Supreme Court of the United States

BACILIO A. AMORRORTU,

Petitioner

v.

REPUBLIC OF PERU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

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I. INTRODUCTION

Through this reply brief, pro se Petitioner replies to the factual and legal arguments presented in the Brief in Opposition of the Respondent. Petitioner holds that the United States Court of Appeals for the Fifth Circuit decision that affirmed the District Court's Dismissal of Amorrortu's Complaint incorrectly held that Petitioner has failed to allege a sufficient basis for jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. ("FSIA"). Petitioner, in his Petition for a Writ of Certiorari, presented four questions and argument explaining why his certiorari petition should be granted by the Supreme Court of the United States.

Petitioner asserts that this is the most important and unusual FSIA case in regards to a Plaintiff, who has been granted political asylum in the United States, who signed a contract during Peru's Brady Plan, under the Laws of the State of New York. This contract, between Petitioner and Respondent, represented by the commercial bank Swiss Bank Corporation New York Branch ("SBC"), now operating as UBS, was to recover individual monies. This is in contrast to the cases mentioned in the decisions below, which involved plaintiffs who signed contracts under the Laws of foreign States or where the facts of the cases occurred in foreign states.

Respondent, in the Brief in Opposition, repeating the erroneous reasons stated in the opinions below, argues that the issues involved are related to facts which occurred in Peru under the Laws of Peru, ignoring that the nature of this action is to seek damages, monies and reimbursement to be paid by Respondent due to civil rights violations executed by Respondent against Petitioner in the United States under this contract signed by Petitioner and Respondent during Peru's Brady Plan under the Laws of the State of New York.

Respondent admits that Petitioner obtained political asylum in the United States; this was granted due to political persecution executed by Respondent against Petitioner during the repressive regime of Peru's President Fujimori, who is now imprisoned in Lima, Peru for 25 years convicted for murder, human rights violations and corruption. These violations of Petitioner's civil rights occurred in the United States through a contract signed by Petitioner during Peru's Brady Plan. This represents the matter of this case and the nexus with the United States in order to apply the FSIA exceptions that, erroneously, the courts below misunderstood.

Also, Respondent erroneously argues that there is no conflict with the holding in the Elliott, Pravin, Weltover, Siderman de Blake, Zappia and Guevara cases mentioned in the certiorari petition.

Additionally, Respondent admits the existence in the records of Petitioner's 49 exhibits that the courts below

ignored, which were released to Respondent by the Court of Appeals.

Finally, Respondent erroneously argues that there are various additional grounds to dismiss the action, when the courts have held that the FSIA provides the sole source of subject-matter jurisdiction in suits against a foreign state.

As demonstrated in the certiorari petition, this case is the appropriate vehicle to further address the FSIA and its exceptions. Therefore, further review is warranted, and the petition should be granted.

II. ARGUMENT

A. STATEMENT OF THE CASE

1. Respondent, reiterating the erroneous opinions below, continues to argue that this case concerns facts and a dispute which occurred in Peru

Petitioner asserts that this case is not a complaint of Petitioner on behalf of his oil company Propetsa to recover his oil assets and damages, nor of the liabilities of Respondent in the death of his wife. Pet. 6. Respondent erroneously argues that:

"the central claims in this lawsuit are actually that the Republic is liable to Petitioner for political persecution, because the Republic allegedly confiscated

and destroyed Propetsa's assets and failed to pay debts owed to Propetsa. See e.g., Pet. 2,3, 5-8. But Petitioner has failed to provide any evidence that any of these alleged actions took place in the United States, or that they had any direct effect in the United States". Br. in Opp. 11.

As in the courts below, Respondent again confuses the statement of the facts with the nature of this action, again selecting the facts which occurred in Peru and avoiding mention of the facts occurring in the United States. The central claims in this lawsuit are not that the Republic confiscated and destroyed Propetsa's assets as Respondent says, rather the central claims in this lawsuit are that Republic is liable to Petitioner for political persecution, because "In the office of SBC's New York Headquarters, SBC's Executive Director told Petitioner that the Bank could not pay him due to political reasons in relation to an order received from the repressive regime of Peru's President Fujimori... This was political persecution executed against Petitioner in the United States" Pet. 5. This was the principal fact for which Petitioner was granted political asylum.

2. Respondent admits the existence of an Agreement

Respondent admits the existence of the contract with SBC. Roa (Record of Appeal) at 38 Exs. 18. But

Respondent ignores that this contract is signed by Petitioner, governed by the Laws of the State of New York and is dated October 27, 1995 under Peru's Brady Plan. On the same day "On October 27, 1995, Peru and the BAC [Bank Advisory Committee for Peru] publicly announced an agreement in principle for a debt restructuring plan designed in accordance with the Brady Plan". Elliott Associates, L.P. v. Republic of Peru 12 F.Supp.2d 328,335 (S.D.N.Y. 1998). Also in Elliott, "to execute purchases, (Respondent) issued guidelines to SBC as to the type and amount of debt to purchase and the maximum purchase price". Id. at 341. This clearly demonstrates that the aforementioned contract was signed by Petitioner and Respondent, represented by SBC, under Peru's Brady Plan.

3. Respondent ignored Exhibit 19 which clearly shows the breakdown and amounts of the debts agreed in the contract

Respondent, in reference to the contract, mentioned: Exhibit 18, the contract; and Exhibits 20, 26-27, communication letters and a loan offer. These Exhibits show the commercial relation between Petitioner and Respondent represented by SBC. Br. in Opp. 5. But Respondent ignored Exhibit 19 that clearly shows the breakdown of the debts and monies, agreed in the contract, owed separately to Petitioner

and to Propetsa. This Exhibit shows four amounts: principal owed to Propetsa (due to unpaid oil services furnished to PetroPeru), interest owed to Propetsa (due to the time passed) and taxes owed to Sunat (due to unpaid taxes to the Peruvian tax collection agencies) and the debt owed to Petitioner (due to Petitioner's funding to collect the debts). Roa at 39 Exs. 19.

4. Respondent admits the existence of the disclosure of Peru's Brady Plan

The official disclosure of Peru's Brady Plan is mentioned by Respondent as a simple newspaper article published in El Comercio, a Peruvian newspaper. Br. in Opp. 6. It is clear, as demonstrated in the certiorari petition (Pet. 29) that this was an official disclosure. An original of this disclosure is presented as Exhibit 30. Roa 38, Exs. 30. This evidence: clearly describes how Respondent, represented by SBC, purchased Peruvian debts to private creditors through commercial contracts, such as Petitioner's contract; clearly identifies Respondent as a party to these contracts; and clearly demonstrates that Peru's Brady Plan was one of the Brady Plans that included private debts.

5. The Court of Appeals and District Court decisions

Respondent repeats the erroneous reasons issued by the Court of Appeals and the District Court which held that the waiver exception of Section 1605(a)(1), the commercial activity exception of Section 1605(a)(2), and the expropriation exception of Section 1605 (a)(3) of the FSIA did not apply. Br. in Opp. 12-13. As demonstrated in the certiorari petition (Pet. 22-38) the District Court, by ignoring the aforementioned evidence shown in the record through exhibits 18, 19, 30 in their analysis (Pet. App. 9a), misunderstood the application of the law in relation to Petitioner's contract, negotiations and effects of Peru's Brady Plan, and erred in not holding that the FSIA exceptions apply in this case.

As in the courts below, Respondent again confuses the statement of the facts with the nature of this action, again selecting the facts which occurred in Peru that Petitioner mentioned in his complaint as a summary and avoiding mention of the facts occurring in the United States under the Laws of the State of New York during Peru's Brady Plan negotiations.

In the same way, erroneously, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's reasons and decision in an unpublished opinion.

B. REASONS FOR GRANTING THE PETITION

As fully demonstrated in the certiorari petition, Pet. 14-21, this case is important and warrants review. However, the following replies to Respondent's reasons for denying the petition.

Respondent argues that Petitioner attempts to raise the issue of whether nexus with U.S. jurisdiction must be found in claims arising from contracts reached under the Brady Plan, and that this issue was asserted for first time on appeal. Br. in Opp. 15. This is incorrect. The pro se Petitioner, as Plaintiff, raised the issues related to Peru's Brady Plan in the original complaint, therein called the Peruvian Brady Plan (Complaint pgs 4 and 5, points 14-17), because Peru's Brady Plan is a central matter in this case.

Respondent argues that "Petitioner contends that the courts below failed to recognize the "Peruvian Brady Plan"..." and further states that "[t]hat assertion is not accurate" (Br. in Opp. 16). To the contrary, Petitioner holds that that assertion is accurate. The opinion below states, "[t]he Court is not entirety clear about the meaning of these allegations, but its best interpretation is that [Petitioner], on behalf of Propetsa, sold his right to receive the six million dollars from the Republic of Peru to SBC". Pet.App.4a". There is no mention in the contract of a sum of six million dollars, nor any sums amounting to a total thereof, in fact, the amounts agreed in the aforementioned contract signed by Petitioner and shown in Exhibit 19 amount to the sum of 16.83

Million dollars. See Roa 38. Exs 19. Neither was Petitioner, due to this inaccuracy and others, given the opportunity to remand the complaint to clarify these issues, as Petitioner mentioned in his certiorari petition (Pet. 41-44).

C. THERE IS CONFLICT PRESENTED HERE

Respondent, in its Brief in Opposition, argues erroneously that the body of the petition fails to provide any substantive analysis of conflicts. Br. in Opp.15. As demonstrated in the certiorari petition (Pet. 22-41), the decision below is in conflict with the decision of other United States Court of Appeals on the same important matter.

1. There is conflict with the holding in Elliott

Respondent argues that there is no conflict with the holding in Elliott and that "the core facts and issues in Elliott are entirely distinct from those in the instant case" (Br. in Opp. 17).

To the contrary, Petitioner asserts that there is conflict. In Elliott, the Court of Appeals upheld the existence of Peru's Brady Plan, in which Peruvian debts were negotiated and purchased and that "Peru's Brady Plan was agreed upon by 180 commercial lenders and suppliers" Elliott Associates, L.P., v. Banco de la Nacion and the Republic of Peru, 194 F.3d

363, 368 (2nd. Cir. 1999). In Petitioner's case the courts below misunderstood the case and its relationship with Peru's Brady Plan.
Also in Elliott, where the plaintiff was "seeking damages for non-payment of the debt", Id. at 363, the Court of Appeals ruled against Respondent, the Republic of Peru, ordering payment to Elliott for damages and the Peruvian debt. In Elliott, Respondent, as in Petitioner's case, tried to elude payment under the Laws of the State of New York, without success.

2. There is conflict with the holding in Pravin

Respondent argues that there is no conflict with the holding in Pravin stating "Petitioner also cities dicta from Pravin Banker Associates, Ltd. v. Banco Popular, 109 F.3d 850 (2nd Circ. 1997), in support of the assertion that Peru's agreements under the Brady Plan universally constituted "commercial activity". Pet. 30." (Br. in Opp. 18.) To the contrary, by citing Pravin, Petitioner asserts that Peru's Brady Plan was related to Peruvian commercial debts as stated "Peru's efforts to renegotiate its commercial debt under the Brady Plan". Id. at 852. Therefore, as in Elliott, Petitioner demonstrates that there is conflict.

Again as in Elliott, the Pravin ruling also upheld the existence of Peru's Brady Plan, in which Peruvian debts were negotiated and purchased.
Also, in Pravin, where the plaintiff was "seeking enforcement of debt". Id. at 850, the Court of Appeals ruled against Respondent, the Republic of Peru, ordering payment to Pravin of the Peruvian debt. In Pravin, Respondent, as in Petitioner's case, tried to elude payment under the Laws of the State of New York, without success.

3. There is conflict with the holding in Weltover

Respondent, in reference to Weltover, argues that "there are no bonds at issue here, and there is no conflict with this Court's decision." Br. in Opp. 19. To the contrary, Petitioner asserts that there is conflict, as demonstrated in the certiorari petition (Pet. 30). In Weltover, the Supreme Court in its conclusion held that "[we] conclude that [Peru's] issuance of the Bonods was a 'commercial activity' under the FSIA" Republic of Argentina v. Weltover 504 U.S. 607, 620 (1992). Petitioner asserts that there are bonds at issue here because the aforementioned Petitioner's contract was signed by Petitioner during Peru's Brady Plan and the amounts agreed in all the contracts involved in Peru's Brady Plan are related to the purchase of Peruvian debts during Peru's Brady Plan which were

paid either as cash and/or bonds called Brady bonds. Roa 38 Ex 30.

4. There is conflict with the holding in Siderman

Respondent argues that there is no conflict with the holding in Siderman, where the foreign state "Argentina had impliedly waived its sovereign immunity because it had deliberately involved the United States courts in Argentina's persecution of the plaintiffs through frivolous and malicious litigation." Br. in Opp. 21. To the contrary, Petitioner demonstrated that there is conflict with the holding in Siderman in the certiorari petition (Pet. 34-35). Petitioner asserts that the waiver exception to the FSIA applies, because "With respect to implicit waivers, the courts have found such waivers in cases ...where a foreign state [Respondent] has agreed that the law of a particular country [New York Laws] should govern a contract." Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 721 (9th Circ. 1992). As in Siderman, This source applies in Petitioner's case where Respondent, represented by SBC, signed a contract with Petitioner, governed by the Laws of the State of New York.

5. There is conflict with the holding in Zappia

Respondent argues that there is no conflict with the holding in Zappia, and repeats the erroneous reasons stated in the opinions below which only considered facts that occurred in Peru stating that "the Court is not convinced that any rights in property are actually in issue." Br. in Opp. 23. To the contrary, Petitioner asserts in the certiorari petition (Pet. 35-37), that there is conflict with the holding in Zappia which states four requirements "to establish jurisdiction pursuant to the FSIA expropriation exception" Zappia Middle East Construction Company Limited, v. The Emirate of Abu Dhabi, 215 F.3d 247, 251 (2nd Circ. 2000). Petitioner's case complies with these four requirements. Therefore, considering that the facts occurred in the United States related to a contract unfulfilled, due to political reasons, by Respondent represented by SBC, under Peru's Brady Plan, in which there was Petitioner's amounts involved, this represents an expropriation exception to the FSIA.

6. There is conflict with the holding in Guevara

Respondent argues that there is no conflict with the holding in Guevara, because "[t]he issues in the instant case have nothing to do with a sovereign's offering of an award to capture a fugitive abroad." Br. in Opp. 25. To the contrary, Petitioner asserts that

there is conflict with this recent and important decision related to the repressive regime of Peru's President Fujimori. Guevara, which was reviewed in a United States Court of Appeals, clearly demonstrates the application of the FSIA's commercial activity exception and how "[p]aying an amount owed under a contract is not itself a sovereign act", Jose Guevara v. Republic of Peru 468 F.3d 1289, 1300 (11th Cir. 2006). Interestingly, Guevara has facts which occurred in Peru and in the United States where "F.B.I. agents located and detained Guevara in Miami". Id. at 1293. Petitioner's case is related to a contract to recover monies, as in Guevara, and concerns facts which occurred in the United States.

D. PETITIONER REPLIES TO ALTERNATIVE GROUNDS MENTIONED BY RESPONDENT

Respondent in its Brief in Opposition argues that there are "many alternative grounds to support the dismissal of Petitioner's suit," Br. in Opp. 27, mentioning the statute of limitations, a lack of standing to assert claims, the act of state doctrine, a forum non conveniens, international comity and finally constitutional principles.

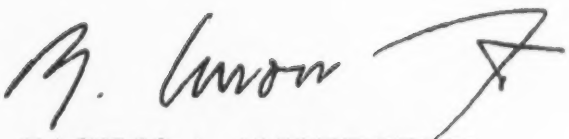
Petitioner, victim of a political persecution executed in the United States by the repressive regime of Peru's President Fujimori and living in Houston, Texas, replies that the FSIA "provides the sole source of

subject-matter jurisdiction in suits against a foreign state." Dale v. Colagiovanni, 443 F.3d 425, 427-428 (5th Cir. 2006) (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-439 (1989)). Petitioner demonstrates in the certiorari petition that Petitioner's claims are not time barred (Pet. 38-41). Petitioner asserts that he is extremely damaged, and, continues to seek for justice before the United States' courts in order to recover his monies and status and return to his successful career in petroleum engineering and as an entrepreneur in the oil business.

III. CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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